Common Ground & Cooperative Enterprise in International Law (1949)

John Q. Barrett[*]

On the evening of April 30, 1949, Justice Robert H. Jackson and his wife Irene attended the formal dinner at the American Society of International Law's annual meeting. The Jacksons dined at the Carlton Hotel in downtown Washington[1] with more than 120 legal leaders from the U.S. and other nations. It was an evening of talk and friendship and, following dinner, a Jackson speech.[2]

The ASIL was one of Justice Jackson's important professional homes, especially in the period following his 1945-1946 service as U.S. chief prosecutor at Nuremberg. Indeed, earlier on this date in 1949, Jackson was elected one of the ASIL's honorary vice presidents. He regularly attended and often spoke at its meetings, where he was regarded as something of the international law leader of the United States government.

Justice Jackson's April 1949 speech was of its time—a time of high tension and rising military peril between the U.S. and the Soviet Union. Jackson addressed that explicitly and at some length. He considered that reality from his experiences with Soviet counterparts at Nuremberg. He spoke of the need for international cooperation and the challenging reality of finding ways to cooperate with nations and peoples whose institutions, experiences and ideas differ significantly from our own. Jackson urged efforts to find common ground even with those we regard as threats,

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[*] Professor of Law, St. John's University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York (www.roberthjackson.org). I emailed an earlier version of this essay to the Jackson List on April 30, 2013.

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[1] Today this hotel is The St. Regis Washington, D.C.

[2] Jackson's full speech is published in A DECENT RESPECT TO THE OPINIONS OF MANKIND…,", SELECTED SPEECHES BY JUSTICES OF THE U.S. SUPREME COURT ON FOREIGN AND INTERNATIONAL LAW (Christopher J. Borgen, ed., 2007), and it is available at www.roberthjackson.org/files/thecenter/files/bibliography/1940s/address-before-the-american-society-of-international-law.pdf.

expressing his hope that people of the law will find that they share some ideas of right and fairness. He outlined a thoughtful understanding of international law's place and its potential. And he called, farsightedly, for law people to make efforts to contact, meet, discuss and learn globally.

May 1st marks, in various locations, "Law Day" or "May Day" or "International Workers' Day" or an anniversary of symbolic Cold War competition or just another springtime day of serious international challenges. In each of those contexts, Justice Jackson's 1949 ASIL speech has much, and much that is hopeful, to say about our time, our law and the value of our efforts to work internationally, including with whoever might be our counterparts to Jackson's Soviet peers in his era.

This Jackson speech is not a quick or an easy read, but I think it merits your attention as time permits.

As with other Jackson words, you will find that this speech contains important ideas, wisdom, humor and other pleasures.

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Address

by

Robert H. Jackson

Associate Justice, Supreme Court of the United States

at

The American Society of International Law
Annual Dinner

The Carlton Hotel,
Washington, D.C.

Saturday, April 30, 1949

…

This Society is entitled to great credit for keeping alive—I might almost say arousing—in the part of the members of the Bar and others, an interest in international law at a time when appreciation of its importance was at very low ebb. As things are today, people have a greater awareness—and particularly members of the [legal] profession—that it is not enough to have good solid domestic institutions unless the international situation permits you to enjoy those institutions and to develop them in peace and in cooperation with other peoples. But I think that appreciation of international law as a means to a better international society was kept alive by this Society at a time when almost no other group in our country, outside of the schools, was doing so.

After three days of constant discussion of international law problems, I suppose it would be a great relief to turn to something else, but I think perhaps you can endure a little more of it if it is not too heavy and quite informal.

I have been wondering what hope there is that international law can develop in the period that is immediately ahead of us, how some method can be worked out by which international legal controversies can be better resolved. Certainly this is no time to give up in discouragement, but also there is no occasion to fail to recognize the great difficulties that face us in the immediate future.

I suppose what really makes a principle a law is its acceptance as such by the informed part of the population. We have known of decisions by courts that somehow or other did not get accepted by the profession. They were not cited; they were not well regarded; and they did not contribute anything to the law. And we know of statutes that have been on the books with all the formality of law, but somehow or other they have no vitality. I was told the other day of one in the State of Maryland which makes it a penal offense for any person in that free State to serve diamond-back terrapin to his servants more than three times a week. Some way or another

such laws become obsolete. Even constitutional provisions, such as our arrangements about the Electoral College, lose vitality unless they are accepted by the current generation; they must not only be accepted by the profession, but they must be accepted by the people working in the fields where they are given practical application.

For a long time any principle could be regarded as international law if it was accepted as such by a consensus of the Western world. Not very much account was taken of opinion outside the circle of nations that made up Western culture. They had their ancient cultures and views and interests, but frankly they were not counted for much by us. It was our circle of what we might call the Atlantic nations which made what we referred to as international law. Now we face a different situation. The balance of power has so shifted that certainly we must take into account, if there is to be progress in the next few years, views of people who have heretofore not counted so much.

This necessity raises some difficult problems. Most of them are not problems exclusively for lawyers; they are problems for the diplomats, but nevertheless they are problems that concern lawyers, at least in the field of international law.

The time when we could think about the world as one world, if there ever was a time when we should have done so in a cultural sense, is past. It was never true in any sense except in that of geography. Instead of meaning that we are all one people, about all there is left of the one-world idea is that there is only one world in which we all have to dwell and there is no place to go to get away from the people we find it difficult to get on with here.

The East and the West are not one people in the sense of legal concepts and institutions. For the next few years, assuming that we are to have a world in which any progress can be made other than military progress, the problem is whether the East and the West can find common meeting--ground on which they can join in making better international

institutions and international law. There are many methods of cooperation, and none of them, of course, should be neglected. Some of them do not appear too hopeful at the present time.

One possibility is treaties, but even tonight we have no treaties which establish peace [following the end of World War II fighting] even if we have no condition which can exactly be called war. We cannot say that the future of treaty-making is especially hopeful.

Custom and practice tend to establish themselves as law, but here we are faced with diversity of custom and practice and a partner in the power that governs the world [the U.S.S.R.] that does not share in many of the concepts that rule us in the West.

There are high expectations from efforts at codification of law. The great difficulty, as I see it, is that codification has never yet come out of people's imaginations; it has come out of their experiences. Codification, therefore, is one of the last ways in which law develops. In some of our law societies, efforts have been made to codify the law merchant. There was an enormous experience to draw on. Innumerable cases had arisen and been decided by the courts, and the problems and the answers that judges had given to those problems from time to time guided those who would attempt codification. Drawing on such experience, lawyers can write codes, but codes do not spring full-fledged from men's minds. The difficulty with codification as a joint effort with the Eastern Powers is that we do not have enough common experience on which we can draw. Our experience is more or less strange to them and theirs is certainly strange to us. In the absence of that experience, codification is a very difficult task. I had some little go at it in London [in summer 1945, before the Nuremberg trial]—not too comprehensive—in the effort to lay a basis on which the Four Powers could cooperate in conducting a criminal trial, probably the most difficult kind of a trial to agree upon. Out of it some small problems arose that indicate the difficulty we will have in working out common principles of law. I do not think it is

impossible, but there are difficulties that we may as well face up to.

If it is true, as the history of English and American law would seem to prove, that a great accumulation of experience precedes much success at codification, then the problem becomes that of whether we can work out a case-to-case experience with the Eastern Powers. Of course, we all know that international courts have functioned and are functioning with success. We know some experience is being accumulated in that way. In the trial of the top Nazis we made some effort at unusually intricate international judicial proceedings. We had some difficulties—some painful difficulties—and we had some successes in spite of that. I think from those endeavors we can draw some lessons as to the difficulties of cooperation. …

… The basic difficulty in cooperating in legal matters with the Soviet Union is that the Soviets have a fundamentally different conception of the function of the judicial institution. That difference runs through nearly all of the difficulties that we had in cooperating at Nuremberg. I do not need to tell you the Soviet concept of a court. You have seen evidence of it. Their writers are entirely frank about it. Their basic concept of a court is an institution that is an instrument of power in the hands of the ruling class. That, says Vishinsky in his book recently published in the United States, is the concept to which we adhere.

Some time ago the Soviet Government refused to refer a case to judicial settlement upon the ground that it would result in a political decision. Of course, under their concept of a court, they would expect a political decision, because they do not recognize the existence of any other kind of courts. That was one of the first things we encountered in trying to work out some arrangement with them. They said that all that was necessary was that the judges should see the defendants and take a little evidence on the subject of sentence. They were already pronounced guilty by Churchill and Stalin and Roosevelt. We convinced them that Mr. Roosevelt could accuse, but he could not convict; that the

same was true of Mr. Churchill. We did not attempt to define Mr. Stalin's powers. They finally agreed that the tribunal should make an independent judgment as to guilt or innocence as well as sentence. I have no reason to believe that they did not agree to it in good faith; nevertheless, all through the proceedings ran the difficulty that they could not understand our concept of a court as an independent institution….

The lack of success is indicated by what happened one day at the trial when I had suggested to the representatives that a memorandum be prepared by the representative of each prosecuting country of the points on which he might expect the German counsel to attack his own country's behavior, and that the memorandum should set forth the position he wished to take as to the attack. I pointed out we did not consider ourselves bound to defend all of the positions which other parties might take, but that we would like to know what their positions would be, so that we at least would not unnecessarily become entangled in controversy. The British thought that was a good thing and they produced a memorandum. The French prepared a memorandum. The Soviets asked for a postponement. A few days later the Soviet representative came in and asked for a meeting. We got together and he pounded the table and said, "What we have to do is each representative get hold of his judges and make them agree that they would not let such a question come up."

I referred the matter of answering them to [U.K. prosecutor] Sir David Maxwell Fyfe, who did it very well; but I think [U.S.S.R. chief prosecutor] General Rudenko is still of the opinion that we were remiss in our duties in not controlling the judges.

If you cannot have international acceptance of the idea of a court that is above serving in its findings of fact and its decisions on questions of law the particular interests that create the court, then I do not see any possibility of working out common judicial experience. No court achieves in actual practice the high level of detachment from interests that we

like to think of as ideal. I suppose if you could achieve an ideal, it would cease to be an ideal. I think we would all admit that in our American practice much is left to be desired by way of detachment even in the best of our judicial work. We are all creatures whose views are conditioned by our prejudices and interests, and we know the weaknesses of our own system; nevertheless, it is a constant ideal with us that, when a man sits in judgment, he shall exercise his own judgment as to applying the law to the facts and not merely serve the interests that put him on the bench.

Our country has engaged in several international arbitrations. You men know better than I do about those. You have read their history more patiently than I have, I am sure. In some of those arbitrations, we started out with the assumption that an arbitrator would have to vote against his own country, because we set up tribunals of equal numbers of nationals of each of the disputing countries. If someone did not vote against the interests of his own nation as represented at the bar, no judgment could be rendered. We have had instances of that kind where a judge on examining the evidence came to the conclusion that his own country was wrong and voted against it.

But that is a conception of the judicial institution that our Soviet friends do not share, neither do the Marxists generally. Those [who are Marxists] in this country do not. It is completely basic to any success, in my judgment, of arbitrations or of judicial institutions. In the attempt to function both for the East and the West, that difference of viewpoint creates a very great handicap on the development of a common experience which would enable us to work out a common international law.

This different view of the way the courts should function ran, of course, to the subject of procedure. Soviet lawyers thought that the court, being a representative of the national authorities creating it, should run the proceedings; that is to say, they believed it was not an adversary proceeding but an inquest. They would apply their own procedure by which there was very little that the attorneys would do, but

the judges would conduct the examinations and cross-examine. I have explained a number of times how that worked out and it shows you how common experience with concrete things is possible, how cooperation can be achieved. When the Soviet representatives found out how cross-examination worked, they loved it. Just like every amateur lawyer, they thought that was the finest kind of sport. But they asked questions in a way that was sometimes most dangerous. If the case had not rested so much on [captured German] documents, I think I would have had a stroke on several important occasions. They would thrust a document in front of the witness and say, "I show you General Order No. 905. Is your reaction positive or negative?"

I never tell that on the Soviet counsel without also telling about the German counsel who also was inexperienced in cross-examination. We had called a witness who gave very damaging testimony as to a number of the defendants. He had not, however, mentioned [defendant Ernst] Kaltenbrunner. Kaltenbrunner was a disbarred Austrian advocate who ran the concentration camps in the later days of the Nazi regime. His lawyer got up to cross-examine and we could not imagine what he was going to ask about, for the witness had not mentioned his client and a witness cannot do a defendant much less harm than that. However, he went to the microphone and said in a gruff, emphatic way, "You have not mentioned my client Kaltenbrunner." "No," said the witness. "Do you know Kaltenbrunner?" "Oh, yes," said the witness. "I met Kaltenbrunner on the afternoon in which he had executed those students who circulated the petition at the university." And he went on to give the damaging details of Mr. Kaltenbrunner's behavior after executing the students. The German counsel said, "Thank you," and sat down. I have never been able to figure out what he thought he had accomplished.

It all goes to the point that you have to have common ideas about the functions of courts and arbitration bodies and other fact-finding and law-deciding groups among those who

are going to share in the kind of experience which builds up a body of law. I do not want to be too pessimistic; I think that there is a great deal more in common and a great deal more possibility of working these things out even with the Soviets than some people believe. I believe, too, that in the Soviet Union there are many people who want to understand our institutions and want to learn more about them. We have to recognize that they are a people who started at least three hundred years behind us. Their legal profession, which was at first abolished under the Revolution and then restored when they decided they had to have some lawyers after all, is trying, within very difficult limitations, to work out a better Soviet law. But they come to the work handicapped not only by starting so far behind, but with no tradition of liberty and freedom of action, no Bill of Rights, no Declaration of Independence, no Declaration of the Rights of Man, no heroes who are heroes because they fought for liberty. They have an authoritarian background, a totally different foundation on which to build.

We know that they have difficulty in comprehending our attitude toward authority and toward law and toward our freedoms. I have spent some hours discussing such things as freedom of the press. Soviet representatives came to me from time to time [at Nuremberg] with items from American newspapers and said to me, "Look at this. Why does your Government permit this? This is an unfriendly act to our Government. It isn't true." I had to admit a good deal of it was not true.

"Why do you permit it?" I thought I would pacify them. I had plenty of material. So I gave them clippings to show what the newspapers said about me. They could not comprehend it. "Does your Government send you over here and let this be published about you?" "Certainly." "Well, it isn't true." "No, it isn't true." "Is your freedom of the press there freedom to lie about people engaged in the work of the Government?" I had to admit it is.

You get into some difficult corners defending some of your own doctrines as against the questions of those people

who are not familiar with it. It is very difficult to make them see that in the long run people do come to understand; they do not have the view of Lincoln that you can fool some of the people some of the time and some of them all the time, but you cannot fool all of them all the time. That is a sort of philosophy that they do not have and cannot understand.

I am sure that the legal professions of these nations have more things in common than they have in antagonism. When you get through all of these difficulties about procedure (and procedure is the worst thing to get lawyers ever to agree on), when you get the substantive doctrines as to what is right and fair between man and man, you find a great body of legal opinion that it would not be difficult for us to assimilate or work with. I wish we had more means by which to learn each other's legal systems.

I think that meetings such as we are attending, in which we go over legal problems, are of great benefit in settling what will be accepted as law. Unfortunately, in the Communist countries they do not have this kind of free meeting. If they could meet together, if we could establish communication between the professions of the two countries on a basis that was free from political sparring, I think we would find that there is a great deal of common ground. I do not know whether there is enough common ground to keep the peace, but certainly our professions must do the best we can to preserve every inch of common ground that there is and to extend it at any opportunity by engaging in every cooperative enterprise that has to do with legal matters to the end that we may understand them better and they may understand us better.

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